duty is absolute with regard to the physician. Yet there are clearly occasions when this duty must give way before the paramount interests of society. First, when, in the absence of the statutory privilege, the physician testifies as witness.[17] The pursuit of justice may naturally abrogate any inferior duty. Second, when, in accordance with statutory enactment,[18] he informs the properly constituted authority of his patient's disease.[19] Here, the mandate of the legislature, growing from "the fundamental principle — *salus populi suprema lex*" [20] — is to be obeyed without question and without fear of liability. So well has statute kept pace with the progress of medicine that it is difficult to-day to imagine any contagion (seriously menacing many lives, if kept secret) which physicians are not required by law to report. But should a case arise which is not covered by statute, a report to proper authorities (or perhaps even to an individual) could doubtless be justified by showing emergency.

But in *Simsonsen* v. *Swenson* the disclosure was volunteered to a private individual without the justification of witness box, statute, or emergency.[21] The case stands for the triumph of medical altruism over legal duty. It sanctions the assumption by the doctor of the police power of the state with regard to disease in contravention of his relational duty to his patient, and grants to the obligor the discretion to perform his duty or not. It is difficult to see how any branch of the government other than the legislative can properly create in any individual so wide a discretion.

DECISIONS WITHOUT OPINIONS. — The failure of the majority of the United States Supreme Court to assign reasons for their conclusions in the cases on the Eighteenth Amendment [1] has been the subject of criticism.[2] That the Court should refuse to discuss paramount questions like the concurrent enforcing power of Congress and the States, and the validity of the Amendment is itself worthy of comment, especially in view of a feeling on the part of a minority of the profession that the power to amend the Constitution is subject to implied limitations.[3] And such summary disposition of the cases raises also the larger question of the value and function of opinions in our law.

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[17] See 4 WIGMORE, EVIDENCE, § 2380 for cases on this point.

[18] Such statutes are generally adopted in the United States. See 1902 MASS. REV. STAT., c. 75, § 50 (amended 1907, 480); 1910 N. J. COMP. STAT. HEALTH, § 247; 1918 N. Y. CONS. LAWS, c. 49, § 25.

[19] Brown *v.* Purdy, 54 Super. Ct. N. Y. 109, 8 N. Y. St. Rep. 143 (1886).

[20] See 1 HAMILTON, SYSTEM OF LEGAL MEDICINE, 2 ed., 633.

[21] The words employed by the physician were actionable *per se*. An action of slander may be met with the justification of truth or the excuse of privilege. The obligation in the ordinary man not to volunteer such words unless he has an actual duty to speak is so enhanced in the case of a physician by his duty not to disclose a professional secret that it would seem impossible to claim for a doctor the common-law defeasible privilege.

[1] Rhode Island *v.* Palmer, U. S. Sup. Ct., No. 29 Original, Oct. Term, 1919 (June 7, 1920).

[2] See concurring and dissenting opinions in Rhode Island *v.* Palmer, *supra*.

[3] See William L. Marbury, "Limitations upon the Amending Power," 33 HARV. L. REV. 223. See 33 HARV. L. REV. 968.

Several arguments may be advanced in favor of rendering an opinion as distinguished from the actual decision. More immediately, a reasoned opinion not only serves to satisfy the litigants, but also promotes certainty and what Bentham calls "cognosability." [4] In the second place, the possibility that a judge may be biased or may render a superficial judgment will be minimized if he knows that the grounds of his conclusions will be subjected to scrutiny by both the laity and the bar.[5] Further the mere fact of a judicial opinion would appear sufficient to allay public distrust,[6] while at the same time constituting an indispensable basis for intelligent criticism. Finally, the opinion is of peculiar significance in the Anglo-American system of case law.[7] While judges need hardly follow Lord Mansfield's advice to write opinions for the benefit of students, they can not disregard the relation of any particular case to the body of law. It matters not which school of thought we follow, whether we agree with those who hold that decisions create law or with those others who maintain they are only declaratory of the law.[8] Under either view, certain cases, at least, mould or modify the law.[9] Such sources must contain the principles and the ratiocination which guided the court. Without reasons a decision is authority only for the special set of facts to which it is addressed.[10] And if this were the only species of decision, the evolution of the law must proceed by some course other than judicial.

In spite of these obvious advantages, the practice of writing opinions has been the object of adverse criticism. Most serious is the argument that the written opinion is responsible for the unwieldy mass of cases with concomitant evils. It is pointed out that the iteration of opinions upon identical issues tends to confuse and conceal basic principles.[11]

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[4] See Roscoe Pound, "Justice According to Law," 14 COL. L. REV. 103, 108–109. See 3 BENTHAM, WORKS, Bowring's ed., 243–244.

[5] See Pound, note 4, *supra*.

[6] Two striking instances are at hand. In 1910 the Ohio Bar Association petitioned the State Supreme Court "to indicate clearly in some appropriate form, the exact points upon which the decision rests, and the reasons influencing the Court, in order that all uncertainty may be dispelled." See 41 NAT. CORP. REP. 189.

In the same year the Erie County (N. Y.) Bar Association passed a remarkable resolution, " . . . it is detrimental for the judges of this state to ignore well-settled legal principles in order to enable them to render decisions which conform more closely to the sense of justice and right of the individual judge." See 22 BENCH AND BAR, 6. Subsequent discussion revealed the dissatisfaction to be based upon the absence of opinions in many cases. See 23 BENCH AND BAR, 3.

[7] See Ezra R. Thayer, "Judicial Legislation," 5 HARV. L. REV. 172; Emlin McLain, "Evolution of the Judicial Opinion," 36 AM. L. REV. 51.

[8] For the former view: see GRAY, THE NATURE AND SOURCES OF THE LAW, § 191.

For the latter view: see JAMES C. CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION, 183–193; 1 BEALE, TREATISE ON CONFLICT OF LAWS, 150.

For a collection of authorities: see Chas. E. Carpenter, "Court Decisions and the Common Law," 17 COL. L. REV. 593.

[9] See John W. Salmond, "The Theory of Judicial Precedents," 16 L. QUART. REV. 376.

The point is illustrated by the statement, " . . . gradual process of judicial inclusion and exclusion, as the cases presented for decision should require, *with the reasoning upon which such decisions may be founded.*" See Davidson *v.* New Orleans, 96 U. S. 99, 104 (1878).

[10] See WAMBAUGH, STUDY OF CASES, 2 ed., § 43.

[11] See the opinion of Thompson, C. J., in Letzkus *v.* Butler, 69 Pa. St. 277 (1871). See Francis A. Leach, "The Length of Judicial Opinions," 21 YALE L. J. 141.

Some feel that on account of the increased volume of litigation, the preparation of opinions delays the more essential operations of the court. While these defects are undeniable, it must be insisted that they are due to abuses, which can be corrected without the complete elimination of opinions.

The problem is by no means novel. The temporary cessation of reporting during the reign of Henry VIII may have been an attempted solution.[12] More recently the courts have assumed the initative in seeking relief, in the face of legislative attempts to preserve the advantages of the opinion. Various statutes and constitutions provide that the decision be written and reasons therefor given.[13] But in most instances, the courts, always jealous of their Constitutional prerogative,[14] have regarded such provisions as directory rather than mandatory; [15] an interpretation which leaves all to the discretion of the judges and renders such provisions meaningless. Some courts, including the United States Supreme Court, have met the situation by the use of *per curiam* decisions where advisable. Others have contented themselves with oral deliveries. And still others have prepared opinions which, however, were not to be officially published. Perhaps the greatest hope lies in an efficient judiciary, well versed in its precedents, so that it can distinguish the essential from the trite without too elaborate opinions for its own edification; and with the desire and ability to avoid the prolixity which is often the result of egotism or inadequate preparation.[16]

Whatever devices of elimination or compression be resorted to, there will always be a residuum of cases which require full discussion. One court has attempted to classify these on the basis of the development of legal principles.[17] To this classification may be added questions of great public interest or political significance. It is here that the necessity of the opinion is most apparent. The advantages increase directly with the degree of interest which the decision arouses in the profession and the public. The disadvantages, since they lie largely in the danger of multiplicity, decrease with the importance of the case. No better example of such a question could be found than the decision upon the Eighteenth Amendment, and we cannot refrain from calling attention again to the complaints by a concurring justice and a dissenting justice against the absence of reasons for the decision.[18]

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[12] "And in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like Eliphantine libri of infinite length, and in mine opinion, lose somewhat of their present authority and reverence." Co. Rep., part 3, pref. 3.

See 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 458.

[13] See 23 BENCH AND BAR, 3, 5, for a list of states.

[14] See Houston *v.* Williams, 13 Cal. 25 (1859). *Cf. Ex parte* Griffiths, 118 Ind. 83 (1888).

[15] See Horner *v.* Amick, 64 W. Va. 172, 175, 61 S. E. 40, 41 (1908).

[16] See John H. Wigmore, "Qualities of Current Judicial Decisions," 9 Ill. L. REV. 529, 531.

[17] See opinion in Yazoo & M. V. R. Co. *v.* James, 108 Miss. 852, 67 So. 484 (1914). Among the classes: (1) cases involving the application of an old principle of which the restatement has for any reason become necessary; (2) cases involving the application of a new principle; (3) cases involving a new application of an old principle.

[18] See note 2, *supra*.